

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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NATIONAL CASUALTY CO., a Wisconsin  
corporation,  
  
Plaintiff,

v.

EFREN ISAAC SOTELO, an individual; and  
PHILIP MICHAEL BOUCHARD, an  
individual,

Defendants.

Case No. 2:17-cv-02456-KJD-CWH

**ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS**

This is an action for declaratory relief with respect to an insurance policy issued by Plaintiff National Casualty Company ("NCC"). Presently before the Court are Defendant Philip Michael Bouchard's ("Bouchard") Motion for Summary Judgment (#74) and Motion to Dismiss (#77). Plaintiff responded (#79/80) to which Defendant replied (#82/85).

**I. Factual and Procedural History**

In July 2016, Bouchard filed a negligence suit in state court after suffering injuries in a car accident with Efren Sotelo ("Efren"). (#74 at 4). Efren was driving a pick-up truck owned by his father, Juan Sotelo's ("Juan") company Now Services of Nevada, LLC dba Cool Air Now ("Cool Air"). Id. Plaintiff provided commercial automobile insurance to Cool Air. (#1 at 2). The policy covered as insureds the named insured and "anyone else while using with [the named insured's] permission a covered 'auto.'" Id. at 3. Whether Efren was a permissive user of the truck is the main issue in this case. NCC alleges that Efren was not a permissive user because he

1 was driving a stolen truck after Cool Air fired him two days prior to the accident. Id. Juan filed a  
2 police report for the stolen truck on the day of the accident. Id. at 4. Bouchard alleges Efren was  
3 a permissive user because his termination paperwork shows that his final day of work would  
4 have been after the day of the accident. (#74 ex. 5). Because NCC alleged that Efren did not have  
5 permission to use the truck, it did not defend him in the original state court action. (#1 at 4).  
6 Efren failed to respond to the complaint and the state court entered default judgment against him.  
7 Id. NCC filed this suit seeking declaratory judgment in September 2017. Id. at 5.

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9 This Court stayed the proceedings pending resolution of the state action in April 2019.  
10 (#65). The question of whether Efren was a permissive user of the truck and therefore whether  
11 NCC owed Efren a duty to defend and indemnify would have been resolved during that trial. Id.  
12 at 2. However, Bouchard dismissed Juan and Cool Air the day before trial began. (#80 at 2).  
13 Without Juan and Cool Air as parties, the state court could not answer the permissive use  
14 question. Id. In April 2019, after receiving the default judgment, Bouchard filed a complaint in  
15 state court alleging breach of contract, breach of implied covenants of good faith and fair  
16 dealing, and declaratory judgment against NCC, another insurance company, and two law firms.  
17 (#87-1). The claims arose from the same set of facts as the original action and NCC's alleged bad  
18 faith in not defending Efren. Id.

## 19 II. Legal Standard

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21 Declaratory judgment allows the Court to adjudicate a party's rights or obligations before  
22 it seeks a coercive remedy. Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir.  
23 1996). However, the Declaratory Judgment Act does not expand the Court's jurisdiction. Id.; see  
24 also Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). Rather, a claim for  
25 declaratory relief is subject to the same federal jurisdictional requirements as any other case; it  
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1 must be “brought by [an] interested party,” and it must involve an actual controversy. See 28  
 2 U.S.C. § 2201; Moseley, 80 F.3d at 1405. A declaratory judgment action that seeks clarification  
 3 of an insurer’s coverage obligation or duty to defend is ripe for judicial review. See Govt. Emp.s  
 4 Ins. Co. v. Dizol, 133 F.3d 1120, 1222 n.2 (9th Cir. 1998); AAA Nev. Ins. Co. v. Chau, No.  
 5 2:08-cv-00827-RCJ-LRL, 2010 WL 1756986, at \*3 (D. Nev. Apr. 30, 2010).

7 Summary judgment is appropriate where there exists no genuine issue of fact and when  
 8 the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Celotex  
 9 Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of showing the  
 10 absence of genuine issues of material fact. Celotex, 477 U.S. at 323. The burden then shifts to the  
 11 nonmoving party to show specific facts demonstrating a genuine factual dispute for trial. See  
 12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court makes  
 13 all justifiable inferences in favor of the nonmoving party. Matsushita, 475 U.S. at 587. However,  
 14 the nonmoving party may not merely rest on the allegations of his pleadings. Rather, he must  
 15 produce specific facts—by affidavit or other evidence—showing a genuine issue of fact.  
 16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Summary judgment is not  
 17 appropriate if a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

### 20 III. Analysis

21 Defendant filed a motion to dismiss and a motion for summary judgment. The court  
 22 analyzes each individually.

#### 24 A. Motion to Dismiss

25 When determining if a declaratory judgment action should be dismissed, “[t]he Brillhart  
 26 factors remain the philosophical touchstone for the district court.” Dizol, 133 F.3d at 1225. The  
 27 court has three main considerations: it “should avoid needless determination of state law issues;  
 28

1 it should discourage litigants from filing declaratory actions as a means of forum shopping; and  
 2 it should avoid duplicative litigation.” Id. These factors are not exhaustive, and the district court  
 3 may make other considerations, such as:

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 5 “Whether the declaratory action will settle all aspects of the controversy; whether  
 6 the declaratory action will serve a useful purpose in clarifying the legal relations  
 7 as issue; whether the declaratory action is being sought merely for the purposes of  
 8 procedural fencing or to obtain a ‘res judicata’ advantage; or whether the use of a  
 9 declaratory action will result in entanglement between the federal and state court  
 10 systems. In addition, the district court might also consider the convenience of the  
 11 parties, and the availability and relative convenience of other remedies.”

12 Dizol, 133 F.3d at 1225 n.5. The Brillhart factors and the additional considerations weigh in  
 13 favor of not dismissing.

14 i. Needless determination of state law issues

15 When “parallel state proceedings involving the same issues and parties [are] pending at  
 16 the time the federal declaratory action is filed, there is a presumption that the entire suit should  
 17 be heard in state court.” Id. When NCC filed this suit, there was a parallel state proceeding. To  
 18 avoid a needless determination of a state law issue, this Court stayed the case pending resolution  
 19 of the state law claim. However, Bouchard dismissed Juan and Cool Air which prevented the  
 20 state court from making the necessary state law determination. This case focuses on a single  
 21 question, whether Efren was a permissive user of the truck on the day of the accident. That  
 22 question would have been answered had Bouchard continued to trial. Bouchard’s actions created  
 23 a need for this Court to make a determination of state law. The state tort case did not involve the  
 24 same issues as this federal declaratory action, which centers on the coverage dispute, not  
 25 liability. As the Ninth Circuit has held, when “the state court case did not include the coverage  
 26 issue, and because the coverage issue in the federal action [is] not contingent on any further state  
 27 court proceedings, the district court [finds] good cause to continue to exercise jurisdiction.” Am.

1 Cas. Co. of Reading, Penn. V. Krieger, 181 F.3d 1113, 1119 (9th Cir. 1999). This is not a case in  
 2 which the federal court is faced with a request for a needless determination of state law issues.

3 ii. Forum shopping

4 “This factor usually is understood to favor discouraging an insurer from forum shopping,  
 5 *i.e.*, filing a federal court declaratory action to see if it might fare better in federal court at the  
 6 same time the insurer is engaged in a state court action.” Id. However, defendants can also  
 7 offend this factor by attempting to restart in state court after the case has proceeded in federal  
 8 court. See id. By staying the case pending the resolution of the state law action, this Court made  
 9 sure NCC was not forum shopping. However, Bouchard dismissed certain defendants, obtained a  
 10 default judgment while avoiding the resolution of the main question, and then filed a similar case  
 11 in state court. His actions appear to be more of an effort to forum shop than Defendant’s as he  
 12 wishes to proceed in state court after three years of litigation in federal court. This factor weighs  
 13 in favor of the Court retaining jurisdiction and against dismissing.

14 iii. Duplicative litigation

15 This case is similar to the previously mentioned case Am. Cas. Co. of Reading, PA v.  
 16 Krieger, 181 F.3d 1113 (9th Cir. 1999). In Krieger, when a motion to dismiss was filed in federal  
 17 court, “the state court litigation had concluded without deciding the coverage issue before the  
 18 district court in the declaratory relief action.” Id. at 1119. Similarly, the original state action in  
 19 this case concluded without deciding the coverage issue. The federal court action was not  
 20 duplicative in Krieger and it is not duplicative here.

21 iv. Additional considerations

22 The additional considerations that the Ninth Circuit permits the district court to look at  
 23 also weigh against dismissal. A decision in this declaratory action will settle the controversy that  
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1 has not been resolved during this three-year-long litigation process. It will also clarify the legal  
 2 relations at issue. Additionally, the Court does not find any evidence that NCC filed this case to  
 3 obtain a *res judicata* advantage.<sup>1</sup> Retaining jurisdiction in this declaratory judgment action will  
 4 not result in entanglement between the federal and state court systems as this will answer the  
 5 question that neither court has been able to answer to date. There is a vast docket in the federal  
 6 action that has been ongoing since 2017 and a dismissal now would offend judicial economy and  
 7 promote the waste of judicial resources.

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 9 Because the Brillhart factors and additional considerations weigh in favor of this Court  
 10 retaining jurisdiction, dismissal is inappropriate.

#### 11 B. Summary Judgment

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 13 Defendant's motion for summary judgment fails for the same reason that NCC's motion  
 14 for summary judgment failed in November 2018. The same genuine issue of material fact exists  
 15 today that existed three years ago when this case began. Whether Efren was a permissive user of  
 16 the truck has not come any closer to resolution since the last time this Court ruled on a motion  
 17 for summary judgment. Because this same genuine issue of material fact exists, summary  
 18 judgment is improper.

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 20 Bouchard also argues that this claim is precluded under *res judicata* principles. For claim  
 21 preclusion to apply "the following factors must be met: 1) the same parties or their privies are  
 22 involved in both cases, 2) a valid final judgment has been entered, and 3) the subsequent action  
 23 is based on the same claims or any part of them that were or could have been brought in the first  
 24 case." Five Star Cap. Corp. v. Ruby, 194 P.3d 709, 714 (Nev. 2008). Bouchard argues that the  
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 28 <sup>1</sup> While NCC is not seeking a *res judicata* advantage, Bouchard is. In the Court's opinion, this weighs against Bouchard in his motion to dismiss.

1 default judgment is a judgment on the merits because “the facts alleged in the pleadings will be  
2 deemed admitted.” Foster v. Dingwall, 227 P.3d 1042, 1049 (Nev. 2010). The Court disagrees.  
3 The next line in Foster states: “Thus, during an NRCP 55(b) prove-up hearing, the district court  
4 shall consider the allegations deemed admitted *to determine whether the nonoffending party has*  
5 *established a prima facie case for liability.*” Id. (emphasis added). A court should only consider  
6 the allegations deemed admitted to determine if the nonoffending party has established a prima  
7 facie case of liability in a prove-up hearing. This is further supported by the Nevada Court of  
8 Appeals, which stated that with a default, “the well-pleaded allegations of a complaint *relating to*  
9 *liability* are taken as true.” Seefeldt v. Griffie, 2019 WL 6972230, \*2 (Nev. Ct. App. 2019)  
10 (quoting VLM Food Trading Int’l Inc. v. Ill. Trading Co., 811 F.3d 247, 255 (7th Cir. 2016))  
11 (emphasis added). The allegations are only taken as true when they relate to liability. Whether  
12 Efren was a permissive user of the truck is the main question; liability for the accident is not at  
13 issue in this action. The default judgment is silent to the question and claim preclusion is  
14 improper. Because Defendant cannot satisfy the final judgment prong of claim preclusion  
15 analysis, it is unnecessary to analyze the other two factors.

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19 IV. Conclusion

20 Accordingly, IT IS HEREBY ORDERED that Defendant Philip Michael Bouchard’s  
21 Motion for Summary Judgment (#74) and Motion to Dismiss (#77) are **DENIED**.  
22 Dated this 23rd day of September, 2020.  
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26 Kent J. Dawson  
27 United States District Judge  
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